NOTES AND SUGGESTIONS

Disloyalty in Two Wars

Among the many interesting comparisons that now can and will be made between the war of 1861 and that of 1917 in respect to the policies and achievements of the American government, none is likely to be more striking than that concerned with the treatment of disloyal civilians. The situations confronting the authorities at the two crises were of course widely different on their face. A civil war, with hostilities raging close to the seat of government, and a foreign war, with the centre of action three thousand miles away, must present unlike problems. Yet a very casual reading in the contemporary literature of the two periods reveals a far-reaching parallelism in incidents and ideas.

For dealing with the non-military activities of Southern sympathizers the Lincoln administration had at the outbreak of war little statutory or judicial equipment. Few of the enterprises that were most helpful to the South were criminal under federal law or cognizable by the federal courts. Nor was there a Department of Justice with organization and personnel suitable to cope with the situation. Moreover Congress was not at hand to enact necessary legislation. Under all the circumstances the restraint of civilian disloyalty was taken in hand by the executive without reference to legislative or judicial sanction. Mr. Lincoln assumed that his constitutional power as commander-in-chief sufficed for all contingencies that actual war produced, and that he was therefore under no obligation, when protecting and defending the Constitution, to await the authorization of Congress or the sanction of the courts. This assumption remained to the end of the war the basis of the administration's policy.

Upon the outbreak of hostilities there ensued a great and widespread activity in seizing and incarcerating suspected persons in the North. The process was carried on with much zeal but with no semblance of regularity or system. The offenses alleged ran the whole gamut from open treason and levying war to unexpressed compassion for the traitors. As evidence warranting arrest the telegraphic allegation from an unknown source was often as effective as the seizure of correspondence or munitions of war in transit to the Confederates. The agents who actually made the arrests in-

cluded military and naval officers of the United States, federal marshals and district attorneys, and a variety of state functionaries, including sheriffs, constables, and especially city police. Finally, the officials from whom the orders for arrest proceeded showed as much diversity as the other elements in the situation. The commander of the army, the Secretary of War, the Secretary of the Navy, but above all the Secretary of State shared among themselves the responsibility for filling the prisons. Of 103 prisoners in Fort Lafayette, New York, on October 14, 1861, sixty-five had been sent there by the Secretary of State. This probably is about the proportion in which the energetic Seward absorbed the functions of the administration in its early months. Neither the President nor the Attorney General appears as directly concerned in the business of civilian arrests, though some of the orders sent out by the secretaries professed to be by direction or authority of the President.

The prisoners that crowded the forts in which they were confined constituted a most heterogeneous aggregation. There were soldiers and sailors charged with military offenses; there were civilians charged with criminal offenses; there were Southerners who claimed to be alien enemies but were charged with being traitorous citizens; there were Northerners charged with offenses that were no crimes or held, in many cases, with no charge at all. All these classes indiscriminately were in the custody of the army, and no man could get a discharge except through the Secretary of War. Attempts to test and define through the judiciary the authority involved in this situation were peremptorily thwarted by the President's suspension of the privilege of the writ of habeas corpus. It became necessary, however, to introduce eventually some system into the existing chaos. Whether the end should be reached by legislation or by executive action, was a question that gave rise to an interesting conflict between the two departments of the government. The result, as the record shows, was a distinct triumph for the executive.

Some advance in classification was made during 1861 by the official as well as popular recognition of a category of "political prisoners" or "state prisoners". These, the Attorney General explained, were persons arrested not in order to be brought to trial in a civil court for an alleged crime, but in order to be held "subject to the somewhat broad and as yet undefined discretion of the President as political chief of the nation". Because they were usually arrested and held by military authority, they were known also as military prisoners. They were distinguished not only from ordinary

judicial prisoners, but also very clearly from prisoners of war; for the manner of treatment and the right to be exchanged that were assured to the latter by military law were not shared by the political prisoners.

In February, 1862, the Secretary of War issued two executive orders relating to political prisoners. The first directed that, so far as the public welfare will allow, "all political prisoners or state prisoners now held in military custody" be released on their signed parole not to give aid or comfort to the enemy. It was further directed that thereafter "extraordinary arrests" be made by military authority alone. The second order named two commissioners whose duty it should be to examine all "state prisoners" and determine whether they should be discharged, remanded, or sent to the civil courts for trial.

The procedure embodied in these orders was followed without substantial change throughout the war. Civilians were arrested by military order, held in military confinement, and subjected to examination by commissioners appointed *ad hoc* by the Secretary of War. In the later years of the war the functions of these commissioners were in some measure taken over by the Judge-Advocate General's office, which was created in the War Department. In any case it remained perfectly clear that the executive was applying a far-reaching power over the liberty of citizens, with no restraint whatever by the other departments of the government.

Congress sought to assert its own authority in the matter. It empowered the President to suspend the privilege of the writ of habeas corpus, so that what he had been doing for years might have the sanction of its legislation. It added to the list of crimes various acts promotive of rebellion and obstructive of recruiting and the draft, so that offenders could be taken care of by the courts. In particular it enacted that lists of political prisoners must be promptly furnished to the federal courts and the prisoners discharged if no indictments should be found against them.

None of this legislation produced any important effect on the policy or procedure of the administration. Mr. Lincoln retained to the end his conviction that he could handle the habeas corpus matter without reference to Congress. There were few prosecutions for the new crimes that Congress created. As to the peremptory requirement that political prisoners be referred to the courts, some perfunctory attention was given to the act immediately after its passage, but the War Department soon settled back into its old procedure. Persons held in confinement by the executive "otherwise

than as prisoners of war" (to use the words of the law) were transferred, remanded, or released on the judgment, not of the federal courts, but of commissioners appointed by the Secretary of War.

This consistent policy of the administration was due not only to the initial lack of legislation and of adequate organs in the executive departments for dealing with civil war, but also to the unwavering conviction of Mr. Lincoln that the President was vested by the Constitution with a war power so broad and indefinite as to include whatever in his judgment would promote the success of the government's cause. The arrest and detention by summary procedure of civilians suspected of "disloyal practices" he believed to be indispensable to such success, and he felt justified in acting accordingly irrespective of the opinion of either Congress or the courts on the subject.

The record of our war with Germany stands in almost startling contrast to that of the Civil War. President Wilson's authority, actually exercised, surpassed in variety and scope the wildest dreams of 1861–1865. He had in his almost unrestricted control not only the entire man-power of the nation but also its commerce, industry, finance, and transportation. Even the food and health of the people were subject to his supreme regulation. The Lincoln administration might, indeed, have assumed all these sweeping powers; but there would have remained the fundamental distinction that Wilson's authority was based, both in theory and in practice, not upon the constitutional functions of the commander-in-chief of the army and navy, but upon acts of Congress.

This distinction appears perfectly in the matter with which we are particularly concerned. "Disloyalty", "aiding and abetting the enemy", "giving aid and comfort to our foes", were the current coin of fervid speech in 1918 relatively as often as half a century before. "Pacifists" and "pro-Germans" caused as much distress to agitated patriots as did Copperheads and Southern sympathizers, and produced no less astonishing exhibitions of what is now called "war psychology". But our latest war, with all its complexities, has had no "political prisoners" or "prisoners of state", no military arrests, and no suspension of the habeas corpus.

When in 1863 the Chicago *Times* denounced in extreme terms the policy and the personnel of the administration, the paper was summarily suppressed by an order of General Burnside, executed by a detachment of soldiers. When in 1917 the Missouri *Staats-Zeitung* attacked the war policy of the President and "played up Germany's military successes", the authors of the articles were ar-

rested, indicted, tried by jury, and convicted. In 1863 former Congressman Vallandigham at a Democratic meeting charged the Lincoln government with base motives and monstrous tyranny in the conduct of the war; he was seized at night by a squad of soldiers, tried by a military commission, and eventually sent beyond the Union lines into the Confederacy. In 1917 former Congressman Berger wrote and distributed Socialistic speeches and pamphlets bitterly assailing the Wilson administration; he was arrested on warrant, tried by jury, and convicted.

So far as any formal pronouncement defined the basis of the procedure in the Civil War, this is to be found in the President's proclamation of September 24, 1862, declaring that "discouraging volunteer enlistments, resisting military drafts, or . . . any disloyal practice affording aid and comfort to the rebels" would subject the offender to martial law. By proclamation of September 15, 1863, Mr. Lincoln denied the privilege of the writ of habeas corpus to persons held as "aiders or abettors of the enemy". "Disloyal practices" and "aiding and abetting" thus became the basic terms upon which was built by interpretation an imposing array of offenses that could bring a man before a military court. Such, it was declared, were expressions exalting the character, motives, capacity, or resources of the enemy, overrating his success, underrating our own achievements, complaining against the officers of the government, and inflaming party spirit among ourselves.

Extreme as this appears, it is not far from what was made criminal by the Espionage Act of June 15, 1917, as amended May 16, 1918. By these laws spying and other such crimes were made cognizable by the civil as well as by the military courts, and the following were added to the list of criminal acts: Falsehoods to obstruct the sale of bonds; acts or statements causing disloyalty in the army and navy; "disloyal, profane, scurrilous, or abusive language" about the form of government of the United States, or its Constitution, flag, army and navy, or uniform; and saying or printing anything to promote the cause of the enemy or to curtail the production of things essential to the prosecution of the war.

Thus the extent to which restriction of normal liberty by the government was deemed necessary was substantially the same in the one crisis as in the other. The great difference in the methods of applying the restriction was due in large part to two facts. First, federal jurisdiction in criminal matters was in 1861 very limited, and the extension required by the new situation would probably have met with successful opposition both in and out of Congress. Sec-

ond, in 1861 there was no executive machinery for dealing systematically on a large scale with criminal cases. The Attorney General received only by the act of August 2, 1861, authority to supervise and direct United States marshals and district attorneys. Prior to that date these officials were under no specific executive department. This accounts for the utter confusion in the handling of disloyalty at the outbreak of the war. In 1917, on the contrary, the Attorney General was the head of the Department of Justice, equipped with complete authority and a numerous personnel throughout the nation. All powers vested in the President by the legislation referred to were by executive order turned over for exercise to the Attorney General in May, 1918. The secret service of the Department of Justice established at once close relations with the Military Intelligence Office of the army, and the joint activity of these two was responsible for the striking results achieved.

The spirit and record of the Wilson administration must give much satisfaction to those who seek an abiding reign of law. It would, however, be a highly sanguine student of history who would assert that the normal course of justice would have been consistently maintained in our last war if the enemy had been as near to Washington as he was in 1861, or if the conflict had lasted four years, or if great reverses had been experienced, or if our coasts had been threatened at close range by a high-seas fleet instead of by a lonely and furtive submarine.

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HISTORICAL WORK BY ARMY GENERAL STAFFS[1]

WITH the growth of a general staff in an army, when a feeling of responsibility for the sources of information which general staff co-ordination brought together was recognized, and when the necessity for the study and authorized dissemination of the information

[1] The writer desires to make grateful acknowledgment to Col. C. W. Weeks, G. S., chief of the Historical Branch of the War Plans Division of the General Staff, and to Col. J. R. M. Taylor, U. S. A., librarian of the Army War College, for the opportunity and incentive which made possible the writing of this article.

Excellent critical bibliographies of the South African and Russo-Japanese wars are to be found in earlier numbers of this *Review*: "The Literature of the South African War, 1899–1902", by a British Officer, XII. 299–321 (1907); a supplementary communication, by Dr. H. ver Loren van Themaat, XV. 430–432 (1910); "The Literature of the Russo-Japanese War", by a British Officer, XVI. 508–528, 736–750 (1911). Inasmuch as the general staff histories of these wars were still in process of publication, reference to them in these articles is brief and incidental.